Yogeswaran a/l Krishnan v Public Prosecutor and other appeals

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS B-05–94 OF 2011, B-05–97 OF 2011 AND B-05–109 OF 2011
BALIA YUSOF, ROHANA YUSUF AND HAMID SULTAN JJCA
21 JANUARY 2014

Evidence — Adverse inference — Failure of prosecution to call witness — Whether circumstances existed for court to invoke adverse inference against prosecution — Whether prosecution had given reasonable explanation for non-attendance of witnesses — Evidence Act 1950 s 114(g)

The three appellants herein were convicted and sentenced to death by the High Court on a joint charge of murder. Eye-witnesses testified that they saw the appellants, two of whom were armed with a knife, chasing and attacking the deceased on foot over a long distance in a residential area one night. After the assailants had left, the eye-witnesses found the deceased sprawled on the ground in a pool of blood. He died of his injuries shortly after being taken to hospital. The trial judge found the evidence against the appellants to be overwhelming. In their instant appeal against conviction and sentence the appellants said the trial judge erred in impeaching the credibility of a prosecution eye-witness, SP16, before the defence had had the opportunity to cross-examine him and that this amounted to a miscarriage of justice. The prosecution applied to impeach SP16's credit when his testimony during examination-in-chief contradicted his earlier statement to police. The trial judge postponed his decision on the application to allow the defence to cross-examine SP16 but the witness failed to turn up in court throughout the rest of the case for the prosecution at the end of which the trial judge impeached SP16's credibility as he had not afforded an explanation why his testimony differed from his statement to the police. The appellants contended that the trial judge should have invoked adverse inference against the prosecution under s 114(g) of the Evidence Act 1950 because it failed to explain what steps were taken to procure SP16's presence in court after a warrant for his arrest was issued. The appellants also submitted that adverse inference should have been invoked against the prosecution on its failure to offer two of its witnesses, Thambi and Johari, to the defence.

Held, dismissing the appeals:

(1) No miscarriage of justice took place as the trial judge had made it clear that he did not rely upon the PW16's evidence in coming to his decision and that his reliance on other evidence, especially that of five other

eye-witnesses, overwhelmingly established a prima facie case against the appellants. The trial judge was entitled to disregard SP16's evidence as the prosecution's case was sustainable even without his testimony (see paras 19 & 17).

(2) On the facts and circumstances of the case, there was no instance of evidence or of a witness being suppressed or withheld to warrant the drawing of adverse inference against the prosecution under s 114(g). In the case of PW16, the prosecution had explained that the arrest warrant could not be executed against PW16. In the case of Thambi and Johari, the police were unable to locate and arrest the two of them up till the date of the trial (see paras 20 & 24).

[Bahasa Malaysia summary

Ketiga-tiga perayu dalam kes ini disabitkan dan dihukum penjara oleh Mahkamah Tinggi atas tuduhan membunuh bersama. Saksi-saksi memberi keterangan bahawa mereka pada satu malam melihat perayu-perayu, dua daripada mereka bersenjatakan dengan pisau, berlari mengejar dan menyerang si mati dalam jarak jauh di kawasan kediaman. Selepas penyerang-penyerang tersebut meninggalkan tempat kejadian, saksi-saksi mendapati si mati terlantar di atas tanah bergelumangan dengan darah. Dia meninggal dunia akibat kecedaraannya sejurus tiba di hospital. Hakim perbicaraan mendapati keterangan terhadap perayu-perayu adalah kukuh. Dalam rayuan mereka ini terhadap sabitan dan hukuman perayu-perayu menyatakan hakim perbicaraan terkhilaf dalam mencabar kredibiliti saksi-saksi pendakwaan, SP16, sebelum pembelaan mempunyai peluang untuk memeriksa balasnya dan ini merupakan ketidakadilan. Pihak pendakwaan memohon untuk mencabar kredit SP16 apabila keterangannya semasa pemeriksaan utama bercanggah dengan pernyataan awalnya kepada pihak polis. Hakim perbicaraan menangguh keputusannya atas permohonan untuk membenarkan pembelaan memeriksa balas SP16 tetapi saksi gagal hadir di mahkamah sepanjang kes pihak pendakwaan di mana akhirnya hakim perbiacraan mencabar kredibiliti SP16 kerana dia tidak memberikan penjelasan mengapa keterangannya berbeza daripda pernyataannya kepada pihak polis. Perayu-perayu berhujah bahawa hakim perbicaraan patut membangkitkan inferens bertentangan terhadap pihak pendakwaan di bawah s 114(g) Akta Keterangan 1950 kerana ia gagal untuk menjelaskan apakah langkah yang diambil untuk mendapatkan kehadiran SP16 di mahkamah selepas waran untuk penangkapannya dikeluarkan. Perayu-perayu juga berhujah bahawa inferens bertentangan patut dibangkitkan terhadap pihak pendakwaan atas kegagalannya untuk menawarkan dua daripada saksi-saksinya, Thambi dan Johari, kepada pembelaan.

Diputuskan, menolak rayuan-rayuan:

(1) Tiada ketidakadilan berlaku memandangkan hakim perbicaraan telah

menjelaskan bahawa beliau tidak bergantung ke atas keterangan PW16 dalam mencapai kepada keputusannya dan bahawa penggantungannya ke atas keterangan lain terutamanya daripada lima saksi yang lain, secara kukuh membuktikan kes prima facie terhadap perayu-perayu. Hakim perbicaraan berhak untuk tidak mengambil kira keterangan SP16 memandangkan kes pihak pendakwaan adalah boleh diterima walaupun tanpa keterangannya (lihat perenggan 19 & 17).

(2) Atas fakta dan keadaan kes, tiada keterangan atau saksi yang ditindas atau ditahan untuk mewajarkan bangkitan inferens bertentangan terhadap pihak pendakwaan di bawah s 114(g). Dalam kes PW16, pihak pendakwaan telah menjelaskan bahawa waran penangkapan tidak dapat dilaksanakan terhadap PW16. Dalam kes Thambi dan Johari, pihak polis gagal untuk mencari dan menangkap kedua-dua mereka sehingga tarikh (lihat perenggan 20 & 24).]

Notes

For cases on failure of prosecution to call witness, see 7(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 198–216.

Cases referred to

(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v PP [1987] 2 MLJ 336, SC (refd)

Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232; [1983] 3 CLJ (Rep) 101, FC (folld)

Low Kian Boon v PP [2010] 4 MLJ 425; [2010] 5 CLJ 489, FC (refd)

Munusamy v PP [1987] 1 MLJ 492, SC (refd)

Pang Chee Meng v PP [1992] 1 MLJ 137, SC (refd)

Legislation referred to

Criminal Procedure Code s 158

Evidence Act 1950 s 114(g)

Penal Code ss 34, 149, 300(a), 302

Appeal from: Criminal Trial No 45B–197 of 2009 (High Court, Shah Alam)

Alvinthiren Nair (Alvinthiren & Partners) for the first appellant.

Suresh Thanabalasingam (Suresh Thanabalsingam) for the second appellant.

Hisyam Teh Poh Teik (Teh Poh Teik) for the third appellant.

Mohamad Abazafree bin Mohamad Abbas (Deputy Public Prosecutor, Appellate and Trial Division Attorney General's Chambers) for the respondent.

Rohana Yusuf JCA (delivering judgment of the court):

[1] The four accused, Yogeswaran a/l Krishnan ('first accused'), Tony Osmen

a/l Anthonysamy ('second accused'), Murugan a/l Panisilon ('third accused') and Suresh Varman a/l Ramanujayam ('fourth accused') were charged and tried at the High Court in Shah Alam with an offence under s 302 of the Penal Code read together with s 149 of the same Code. At the end of the prosecution case the learned judge amended the charge to read as follows:

> Bahawa kamu bersama-sama dengan mat bersama pada 28 Julai 2009 jam lebih kurang 1.30 pagi di Jalan Dahlia 2 Sek BB2 Bukit Beruntung di dalam Daerah Hulu Selangor telah melakukan kesalahan membunuh Prakas a/l Jayaram (No Kp 830216-08-5621) dan oleh demikian kamu telah melakkukan satu kesalahan di bawah s 302 Kanun Keseksaan di baca bersama s 34 Kanun Keseksaan.

[2] Consequent to that the second accused was acquitted and discharged without his defence being called. The learned judge found a prima facie case been made out under the amended charge against all the other three accused. They were called to enter their defence. The learned judge did not accept their defence and found no reasonable doubt has been casted upon the prosecution's case and convicted them under s 300(a) of the Penal Code. At the conclusion of the trial the learned judge found them guilty and convicted and sentenced all of them under s 302 read together with s 34 of the Penal Code. Hence these appeals by the three appellants.

[3] Appeal No B-05–94 of 2011 is an appeal by the first appellant, Yogeswaran a/l Krishnan who was the first accused at the High Court, Appeal No B-05–97 of 2011 is an appeal by the second appellant, Suresh Varman a/l Ramanujayam, who was the fourth accused at the High Court and Appeal No B-05–109 of 2011 is by Murugan a/l Panisilon, the third appellant who was the third accused at the High Court. They are appealing against their convictions and sentence.

[4] On 1 August 2013 we heard their appeals together. By a unanimous decision we dismissed their appeals and we now give our reasons for our decision.

BRIEF FACTS

[5] The prelude to the murder of the deceased on 28 July 2009 was narrated through the evidence of the deceased's sister Lizawati bt Abdullah ('SP11'). According to SP11 a day before the incident, on 27 July 2009 at about 10.30am the deceased came to her house. While they were having a chit chat, a group of seven to eight persons (including the four accused) came on motorcycles and in a car. They were talking to the deceased in front of her house when an argument broke out. She then saw the four accused beating the deceased with helmet and also with their hands. When she told them she was

calling the police, they fled. Half an hour later the deceased told her that he was going home. The deceased lived in Bukit Beruntung.

[6] Later in the night of 27 July 2009 at about 11.30pm SP5 (Vijayakumar a/l Mathavanan) narrated that he was having drinks with a group of friends (SP5 to SP9) at Jalan Dahlia 2 Bukit Beruntung, Hulu Selangor. At about 12.30am on 28 July 2009 the deceased came to the place. The deceased borrowed telephone battery from one of them and was seen making telephone calls. From the conversation the witnesses could make out that the deceased was calling someone to meet him at that place. As a result, three persons came to the scene. Two of them, Moon (PW16) and Thambi (not called as a witness) came on a motorcycle and another (identified as the first accused) arrived in a car Proton Iswara. The first accused opened the boot of the car and inside was a rotan (exh P14). An argument erupted between him and the deceased.

[7] The deceased ran to his motorbike. The deceased was later seen taking a parang trying to slash the first accused, who tried to ward off the blow and got himself slashed in the arms. The first accused wanted to run away but at that time, three persons (identified as the second, third and fourth accused) arrived at the scene in a Honda Accord. They alighted from the car and together with the first accused chased after the deceased. The second accused was unarmed, but the third and fourth accused were armed with banet (a knife). After a short distance, the second accused stopped. The others pursued and continued with the chase. According to the witnesses, the three accused were seen chasing and attacking the deceased through a row of houses with the deceased falling down a number of times during the chase. Police investigations revealed that the blood trail spread to about 400 meters.

[8] After a while, the three accused stopped chasing, entered into a car driven by the second accused and drove off the scene. It was then that the witnesses came out of hiding. Two of them (PW5 and PW6) went to inform the brother of the deceased (PW4) while the others went to see the deceased sprawled on the ground in a pool of blood. The brother of the deceased came to the scene and brought the deceased to the hospital, where the deceased succumbed to the injuries. He passed away at 3.00am on 28 July 2009.

[9] There was a total of 24 witnesses testifying. At the end of the prosecution case the learned trial judge having scrutinised all the evidence before him found a prima facie case was made out against the first, third and the fourth accused. He however amended the charge as per s 302 read together with s 34 of the Penal Code. He found throughout the case the deceased was attacked by not more than four persons which could not fit into the requirement of s 149 of the Penal Code because the number of persons to constitute an illegal assembly under s 149 is at least five or more.

[10] The learned judge however found overwhelming evidence that the accused were acting in a concerted manner in attacking the deceased and on the facts the learned judge made his finding that common intention between the first, third and fourth accused under s 34 of the Penal Code was made out. The learned judge amended the charge in accordance with s 158 of the Criminal Procedure Code.

[11] On a totality of evidence the learned judge found that the prosecution had made out a prima facie case against all the three accused and called upon each of them to enter their defence.

[12] All the three appellants chose to give evidence on oath. The testimonies of the first accused conform to that of the prosecution case up to the point he was slashed by the deceased. After that he said he called the second accused who came and rescued him from the scene. The second accused testified and confirmed that the first accused called him and further said that by chance the third as well as the fourth accused were with him where he brought them together to the place of incident. The third and fourth accused confirmed the evidence of the second accused and said they were there only by chance. Accordingly, they all left after rescuing the first accused.

[13] Having weighed the evidence of the prosecution and the credibilities of all the witnesses against the defence's case the learned judge found that the defence raised was a bare denial. The evidence led by the prosecution clearly established the offence of murder with all the necessary ingredients proven beyond reasonable doubt. The thirst, third and fourth accused were convicted and sentenced to death under s 302 of the Penal Code.

GROUNDS OF APPEAL

[14] The appellants in their three separate petitions raised a number of grounds of appeal. Before us. Learned counsel for the third appellant Encik Hisyam Teh Poh Teik led the arguments on behalf of the other two learned counsel for the first appellant, En Alvinthiran as well as learned counsel for the second appellant, En Suresh Tahanabalsingam. The two main common grounds by all the three appellants are these:

(a) premature impeachment of SP16 (Shanmuga Sundram a/l Ramanujum); and

(b) failure on the part of the prosecution to offer two witnesses — Thambi and Johari to the defence.

[15] It was the contention of Encik Hisyam Teh Poh Teik that SP16 who was an eye witness present at the scene was impeached without being

cross-examined by the defence and had caused a miscarriage of justice. PW16 testified and his narration is found at p 197 of the appeal records. The prosecution applied to impeach his credit on the contradiction of his testimonies found at p 206 of the appeal records. The learned judge reserved his decision on the impeachment to the end of the prosecution case. He ruled that he would allow cross-examination by the defence of PW16 the next day. On the next day PW16 did not turn up. Learned DPP applied for a warrant of arrest and was granted. The learned judge proceeded with the next witness PW17. Till the end of the prosecution case PW16 did not turn up. At the end of the prosecution case the learned judge impeached PW16 without the opportunity of the defence to cross-examine PW16. In his ruling at p 352 of the appeal records he said:

> Dan jika pun Saksi ini tidak melarikan diri semasa pemeriksaan balas credibility Saksi tersebut tidak dapat untuk di selamatkan. Saksi ini juga tidak dapat beri penjelasan kenapa keterangan nya bercanggah antara keterangan di hadapan polis dan keterangan di dalam Mahkamah. Mahkamah mengambil keputusan untuk tidak mengambil keterangan Saksi ini dalam membuat keputusan kes ini.

[16] Learned counsel pointed out that the above ruling by the learned judge suffers from two errors. First, the learned judge speculated that a cross-examination cannot save PW16's credibility and secondly, the learned judge failed to rule whether the explanation by PW16 was reasonable. It was contended that the ruling on impeachment was therefore an error for being pre-mature. In his submission Encik Hisyam urged this court to invoke s 114 (g) against the prosecution because although the prosecution did apply for a warrant of arrest against PW16 but never explained why and what steps had been taken to procure PW16. He contended that the failure of any witness to attend court cannot penalise an accused person as decided in the Supreme Court case of *Pang Chee Meng v Public Prosecutor* [1992] 1 MLJ 137.

[17] We do not find merit in the above ground raised by the appellant. This is because it is made clear by the learned judge that a prima facie case was made out relying on other evidence adduced by the prosecution, that there was common intention amongst the three accused to commit the offence of murder. In his judgment the learned judge had made a finding of a prima facie case based on the testimonies of five eye witnesses whose credibility was assessed and accepted by the learned judge. No doubt there were some inconsistencies in the testimonies of the witnesses. The learned judge in his written judgment addressed these inconsistencies and found them to be immaterial. The inconsistencies referred to by the learned judge are these; whether there were three or four persons who alighted the car when the car arrived after a call was made by the first accused and another inconsistency was whether the deceased took the parang from his motorcycle or from a drain near his motorcycle. In his finding these inconsistencies are immaterial

inconsistencies. Instead the learned judge found overwhelming evidence on the presence of common intention amongst all the three accused which clearly unfolded from the sequence of events that led to the chasing and attacking on the deceased despite him falling a number of times. Accordingly he found common intention between the first, third and the fourth accused was formed. The prosecution had produced cogent evidence to establish that a prima facie case was made out relying on all the five eye witnesses. We agree with the finding of the learned judge and his analysis of the evidence in coming to his finding. We have no reason to disturb his findings based on the evidence before him.

[18] SP14 (the pathologist) formed the view that deceased died from the injuries inflicted on him, by SP14. The learned judge had deliberated on the necessary ingredients required to constitute an offence of murder. We do not find any appealable error on his finding that a prima facie case was made out.

[19] The evidence of the eye witnesses are overwhelming to establish a prima facie case. It was made clear by the learned judge that he was not relying on the evidence of PW16. His reliance on other evidence was sufficient to establish a prima facie case. Thus in our view the learned judge is entitled to disregard the evidence of PW16 as the prosecution case could be sustained without the testimony of PW16.

[20] Learned DPP Encik Mohamad Abazafree bin Mohamad Abbas conceded that PW16 was not subjected to cross-examination by the defence. There was an arrest warrant applied and issued but the warrant of arrest could not be executed against PW16. We agree with the learned DPP that there was no suppression of evidence as envisaged under s 114(g) for it to be invoked. The Federal Court in *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232; [1983] 3 CLJ (Rep) 101 held that an impeachment of a witness should be assessed as a whole with the rest of the evidence at the appropriate stage either at the close of prosecution case or the defence plus the right to cross-examination or re-examination should not be denied, because his credit may be restored or re-established. In that case the impeachment of the witness in question was done with immediate order and the denial of cross-examination by counsel. However on the overall strength of other evidence the Federal Court held that no miscarriage of justice has been occasioned.

[21] In the light of the above decision we are inclined to agree with the submission by learned DPP that there was no miscarriage of justice on the facts and circumstances of the present case as the other evidences relied upon by the learned judge are overwhelming. The learned judge in fact in the above quoted paragraph made clear that the evidence of PW16 was not considered necessary

in arriving at his decision.

FAILURE TO PRODUCE WITNESS

[22] We now move to the next ground of appeal raised by learned counsel on the failure of the prosecution to offer two witnesses, Thambi and Johari to the defence. The IO (SP18) and the two other witnesses SP5 to SP9 confirmed that Thambi was present at the scene. Thambi was therefore a material witness. Learned counsel submitted that no explanation was made as to why Thambi was not called and contended that the prosecution was withholding or suppressing evidence under s 114(g) of the Evidence Act 1950 applying the rationale in *Munusamy v Public Prosecutor* [1987] 1 MLJ 492. Learned counsel further argued that had Thambi been called, he could have supported the testimony of PW16.

[23] The law on adverse inference under s 114(g) of the Evidence Act in relation to non-calling of a witness is that an adverse inference can be drawn if there is withholding or suppression of evidence (see *Low Kian Boon v Public Prosecutor* [2010] 4 MLJ 425; [2010] 5 CLJ 489). It does not operate merely on account of failure to obtain evidence but it must be a withholding or suppression of evidence (see *Munusamy v Public Prosecutor* [1987] 1 MLJ 492). It may be drawn from withholding not just any evidence but a material one. Such an inference cannot be drawn if there is other sufficient evidence to support the prosecution case (see *(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336). However, the inference will arise where there is acute conflict on a material point in the evidence presented.

[24] Learned DPP in his oral submission before us submitted that there is no issue of suppression because the evidence of Inspector Manimaran a/l Marie the IO (SP18), at p 262 of the appeal records stated that investigation revealed that Thambi and Johari were involved prior to the incident. However when Kpl Subramaniam his subordinate, investigated they were found not to be home after a number of times and till the date of trial they could not be arrested. The drawing of an adverse inference would largely depend on the facts and circumstances of the case. In the circumstances and on the facts of this case, it is clear that there was no withholding and suppression of this witness by the prosecution.

[25] Having perused the appeal records we are satisfied that there are sufficient material to support the charge and the finding made by the learned judge. In the circumstances we are in agreement with the learned judge who was satisfied that on a totality of evidence before him the appellant had not

casted any doubt on the prosecution case. We find the conviction of the appellants to be safe and accordingly dismiss all the appeals.

Appeals dismissed.

Reported by Ashok Kumar